purchasing. The words purchasing or procurement of gas do not appear in the section.[2]

The omission of purchasing from Section 7(b) is, of course, consistent with the Act's coverage as set out in Section 1(b), and is affirmative proof that the Act does not require the Commission's approval for a cessation of purchasing.

B. Necessary To Prevent An Abandonment Of Transportation

The argument is advanced in this Court that the cessation of gas flow constituted an abandonment of transportation, and that the Commission has authority to require purchasing in order to prevent the abandonment. Everything United has said in response to the Commission's argument on abandonment of "facilities" has equal application here. If the Commission's jurisdiction does not extend to the purchasing or procurement of gas, then the Commission does not have authority to require purchasing in order to prevent the abandonment of transportation.

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(2) Section 7(b). "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]."

The Commission's brief implies that every time a pipeline initiates a purchase of gas from a producer, the pipeline must obtain a certificate of public convenience and necessity authorizing it to transport that gas. But this is not the fact. It has been the Commission's practice to issue a certificate of public convenience and necessity authorizing the construction and operation of the pipeline's facilities. Once such facilities have been placed in operation, pipelines have universally made additional purchases of gas for transmission through these facilities without any additional certificate authorization from the Commission. The Commisson's brief is therefore incorrect in suggesting that purchases of gas by pipelines require the existence of a certificate authorizing the transportation of the gas.

C. Necessary To Prevent An Abandonment Of Service

Arguing in the same vein, the Commission says the cessation of gas flow through United's Johnson Bayou Field facilities constituted an abandonment of service which the Commission has authority to prevent by requiring United to purchase Continental's gas. Again, United's response to the Commission's argument based on abandonment of facilities applies equally to the argument based on abandonment of service. And, United adds to this response the fact that it renders no "service" to Continental. The term service as used in Section 7(e) and Section 7(b) of the Act, has been consistently interpreted to mean the furnishing of gas to the purchaser.

In this respect the Solicitor General, on behalf of the Commission, has represented to this Court that the term "service" was the furnishing of gas to the purchaser. The Solicitor's statement, found at page 23 of the Commission's brief in *Sunray Mid-Continent Oil Company v. Federal Power Commission*, 364 U.S. 137, is as follows:

> "As that term is used in Section 7(e) — when read together with Section 7(b) and other provisions of the Act — the 'service' is the continuous furnishing of the gas to the purchaser."

United has discontinued no service to Continental, and neither has it discontinued service to any of its customers. However, the Commission has expressed fear that if a pipeline purchaser has the right to discontinue purchasing upon the termination of its contract with the producer, then the pipeline has the power to render itself unable to continue "service" to its customers. But the solution the Commission suggests is no answer to that problem. The Commission authorizes pipelines to initiate service to customers upon a showing of gas reserves adequate to provide a 12-year deliverability life for the pipeline's annual sales requirements.(3) And, even if the Commission could force the pipelines to withdraw every foot of gas attached to their systems, the Commission and the public would yet depend on the pipelines voluntarily purchasing additional gas reserves in order to remain in business. Obviously, Congress thought the

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(3) Section 2.61 of the Commission's General Policy And Interpretations, 18 C.F.R. 2.61.

profit motive was sufficient to keep interstate pipeline companies from withdrawing from business and that is the reason it declined to give the Commission jurisdiction over the purchasing or procurement of gas by pipelines.

D. Necessary To Prevent Higher Costs To Pipeline's Customers

The Commission argues that the power to require purchasing is needed in order to prevent pipelines from discontinuing the use of existing facilities and building more expensive, substitute facilities. And it argues the power is needed in order to prevent the pipelines from buying more expensive gas. These arguments defy reality. Facilities that are no longer used or useful are removed from the rate base, and the investment and return on these facilities are lost to the stockholders. Moreover, much gas is sold at contractually fixed prices and increased costs cannot be passed on under those sales. These considerations, as well as sound business practices, forbid the unprofitable approach the Commission envisions.

United emphasizes that its presence in this lawsuit reflects its determination to keep its gas costs down and to be able to sell gas at contractual fixed prices. It has engaged in this 4-year contest because it is convinced that the course which the Commission advocates will result in United paying higher costs for gas than it would pay if it can retain its power to bargain with producers. United is equally convinced that in exempting direct industrial

gas sales from Commission jurisdiction and in permitting gas to be sold at contractual fixed prices Congress thought and intended that pipelines would be able to control their gas costs by contracting with producers. It was for these reasons that United resisted Continental's insistence that it could compel United to purchase its gas at an increased price and on terms fixed unilaterally by Continental.

E. In Order To Strengthen The Bargaining Process

The Commission argues that if it can compel a buyer to buy gas and pay the seller's unilaterally fixed price, that will strengthen the bargaining process. But just the opposite is true, for it will destroy the pipeline's bargaining power.

As interpreted by the Commission, the Act permits Continental to exact from United not only a market for its gas but the maximum price and most favorable terms which the Commission will allow, now or in the future. There is no area remaining for bargaining between Continental and United. United has been stripped of all bargaining power.

IV.

THE COMMISSION'S RESPONSE TO *SUNRAY*

The Commission argues that this Court's reference in *Sunray* (364 U.S. at 155) to the seller's obligation to continue delivering gas on the buyer's "request" after expiration of its sales contract, unless it could justify

an abandonment before the Commission, does not support United's position. It says it believes the Court's statement had reference to the purchaser's right *under the contract* to call for delivery on any day of up to 150% of the average daily purchase requirements. But the Commission is wrong in this assumption, for the Court was not referring to obligations *under the contract.* The Court was careful to say it was referring to an obligation which would come into existence "when it [i.e. the contract] expires".

The Commission argues further that all gas is, in any event, "delivered on request" and that the Court's statement recognized a mandatory duty to request delivery of gas after expiration of the contract. United thinks the Court's language had no such strained or complex meaning. The producer's delivery and the pipeline's purchase obligations are fixed by contract, not by "request". Clearly, this Court's reference in *Sunray* to the buyer's right to "request" deliveries, after expiration of its sales contract, was intended to have the ordinary and usual meaning reflected in United's argument.

V.

THE ACT DOES NOT PROVIDE PIPELINES WITH ADEQUATE REMEDIES AGAINST BEING FORCED TO TAKE GAS ON DISADVANTAGEOUS TERMS

The Commission makes no reply to the constitutional issue United raises other than to say it is premature because the Act provides pipelines with adequate remedies against being forced to take gas on disadvantageous

terms, and that United has not invoked the remedies. These adequate remedies, according to the Commission, consist of the Commission's power to review the producer's rates, and the right in the pipeline to apply to abandon the purchase.

The glaring inadequacy in these supposed remedies is that they cannot be employed by the Commission to protect the interests of the pipeline. To emphasize the seriousness of this problem, United repeats that it sold in excess of one-half trillion cubic feet of gas directly to industrial customers in 1965, at prices which were for the most part contractually fixed at specific levels. The suggested remedies provide no procedure by which United, or any pipeline, can recover from such sales the increased rates of producers, and neither do they provide a procedure by which pipelines can be relieved from the increased rates of producers simply because the return realized by the pipelines from such sales is less than fair.

The Commission's power to review the producer's rates provides the pipeline no remedy whatever with respect to this problem. The justness and reasonableness of the producer's rates are measured by the producer's needs, not by the pipeline's.

The other remedy to which the Commission points is for the pipeline to apply for permission to abandon the purchase. But the inadequacy of this remedy is apparent. Since the available gas supply has not been depleted, the Commission cannot authorize an abandonment under Section 7(b) simply because a transaction is

unprofitable to the pipeline. This rigid restriction upon the Commission's powers was pronounced in *United Gas Pipe Line Company v. Mobile Gas Corporation*, 350 U.S. 332, and restated with particularity in *Federal Power Commission v. Sierra Pacific Power Company*, 350 U.S. 348, 76 S. Ct. 368, 100 L. ed. 388, as follows:

> "* * * But, while it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. Cf. Arkansas Natural Gas Co. v. Arkansas R. Com. 261 US 379, 67 L ed 705, 43 S Ct 387. In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest — as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. That the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed 'is necessary in the public interest.' When § 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility."

As United reads these decisions, it would be entitled to an abandonment only if it could show that the increased cost of Continental's gas impaired its financial

ability to continue its service. Clearly this is no remedy at all against being forced to take gas on "disadvantageous terms". The remedies suggested by the Commission do not exist and United's constitutional issue is valid.

Respectfully submitted,

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October 7, 1966

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1966.

United Gas Pipe Line Company, Petitioner, *v.* Federal Power Commission et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November 14, 1966.]

Mr. Justice White delivered the opinion of the Court.

United Gas Pipe Line Company and Continental Oil Company executed a contract effective January 31, 1953, providing for the sale by Continental and the purchase by United of gas produced from the Johnson Bayou Field in the State of Louisiana, at prices stated in the contract. The contract was to run for 10 years and from year to year thereafter unless terminated by either party on 90 days' notice. To effectuate delivery to United's nearby Mud Lake transmission line for transportation of the gas into the Beaumont, Texas, area, Continental constructed several thousand feet of pipeline, separators and storage tanks. United, for its part, constructed a short length of pipeline, a separator, a meter station and valves. United sought, was granted and accepted a certificate of public convenience and necessity authorizing the continued transportation of gas from the Johnson Bayou Field and the construction and operation of the facilities necessary therefor. 14 F. P. C. 582. Likewise, Continental was issued a certificate authorizing the sale of gas to United under the terms of the contract. 15 F. P. C. 1650.

In October 1962 Continental elected to terminate the contract at the end of the primary term. Negotiations for a new contract were fruitless. Continental, after re-

fusing United's offer to continue purchasing on a day-to-day basis at the old contract rate, filed a rate increase with the Commission asking for an effective date of January 31, 1963. The Commission accepted the filing over United's protest.[1] United, after advance notice to Continental, then ceased purchasing gas from the Johnson Bayou Field on January 31, 1963, and has since refused to purchase gas from that source. Following a petition by Continental, an order to show cause issued by the Commission to United and a full hearing, the Commission found that United, by ceasing to take gas from the Johnson field, had abandoned its facilities used for this purpose as well as the service rendered by these facilities, contrary to the provisions of § 7 (b) which forbid such abandonment without the consent of the Commission being first obtained.[2] Accordingly, the Commission ordered United to "renew operation of its Johnson Bayou Field facilities used to purchase gas from Continental" and directed that the purchases by United were to be at Continental's new rate and in volumes consistent with the terms of the contract previously in force. 31 F. P. C. 1079, 1086. The Court of Appeals upheld the Commission's order, 350 F. 2d 689, and we granted certiorari, 383 U. S. 924, because the case involved an important question concerning the

[1] United unsuccessfully petitioned for rehearing of the Commission's order approving the rate increase, 29 F. P. C. 525, but did not seek judicial review of the order.

[2] Section 7 (b) of the Act provides that "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 52 Stat. 824, 15 U. S. C. § 717f (b).

Commission's jurisdiction under the Natural Gas Act. We affirm.

We agree with the Commission and the Court of Appeals that United's refusal to continue receiving gas from the Johnson Bayou Field constituted an abandonment of "facilities" and a "service" to which § 7 (b) applies. That section places conditions on the abandonment of facilities or of any service rendered thereby. The facilities covered by the section are those "subject to the jurisdiction of the Commission," the further identification of which requires resort to other sections of the Act. Section 1 (b)[3] declares that the provisions of the Act are to apply to (1) the transportation of natural gas in interstate commerce, (2) the sale in interstate commerce of natural gas for resale for ultimate public consumption and (3) natural gas companies engaged in such transportation or sale. Under § 7 (c)[4] no natural gas company is permitted to engage in the transporta-

[3] The text of the section provides: "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 52 Stat. 821, 15 U. S. C. § 717 (b).

[4] The text of the section, in relevant part, provides that "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . ." Added by the Act of February 7, 1942, 56 Stat. 83, 15 U. S. C. § 717f (c).

tion or sale of natural gas, or to undertake the construction or extension of facilities therefor without a certificate of public convenience and necessity authorizing such acts or operations. Thus the "facilities subject to the jurisdiction of the Commission" which are reached by the abandonment provisions of § 7 (b) are those facilities required for the interstate transportation of natural gas and for the interstate sale of gas for resale to the ultimate consumer. Conversely, it would seem beyond argument that the proscription of abandoning "any service" rendered by those facilities would include both transportation and sale, the twin functions which subject the facilities to the provisions of the Act.

We are convinced that United's Johnson Bayou Field facilities were subject to the jurisdiction of the Commission. They were constructed solely for the purpose of the taking and interstate transportation of Johnson Bayou gas. They could not, therefore, be abandoned without the consent of the Commission and we do not understand United's position in this Court to be otherwise. United, however, insists that there has not in fact been a § 7 (b) "abandonment." It is true that the Johnson Bayou Field facilities were neither removed nor disconnected. Their use could have been resumed at any time had United so desired. But the physical alteration of facilities is not a *sine qua non* restricting the Commission's jurisdiction under § 7 (b). Here United ceased taking and transporting gas from the Johnson Bayou Field on January 31, 1963, has not taken that gas or used its facilities constructed for that purpose since that time and has no intention of doing so as long as Continental's present rates continue in effect. United, the Commission found, had by its own action rendered its facilities "operationally dormant for a period of indefinite duration." 31 F. P. C. 1079, 1083. In addition, the Commission found that its interest went beyond the

physical alteration of facilities. "We have a regulatory responsibility to assure that gas once dedicated to the interstate market will continue to be available to that market so long as the public interest demands . . . ." 31 F. P. C. 1079, 1082. As the instant proceeding unmistakably revealed, the Commission's responsibility could not adequately be met if it was powerless to assure that facilities "certificated to transport this gas," *ibid.*, continued to operate. To hold United's conduct an abandonment within the meaning of § 7 (b) is a reasonable interpretation of the Act and we shall not disturb it.

The corollary conclusion, inescapably presented by the face of the Act itself, is that the consent of the Commission is necessary before United can cease taking and transporting Johnson Bayou gas, since this is a service United rendered through the facilities it constructed for that very purpose. United, however, contends that the words "any service" in § 7 (b) include only the sale of natural gas, not the taking and transportation of gas from any particular field. In its view it is free at any time to abandon the interstate transportation of gas from the Johnson Bayou Field, and to decide for itself wholly apart from the Commission what gas it will continue to transport interstate. But nothing in the Act, its legislative history or in our cases has been called to our attention which persuasively supports this narrow view or which would justify recognizing the sale of gas as a service but not the preceding transportation without which there would be no sale at all.

The Act gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for hire or for sale and whether the sale is for consumption or resale. *FPC* v. *East Ohio Gas Co.*, 338 U. S. 464; *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1; *Panhandle Eastern Pipe Line Co.* v. *FPC*, 359 F. 2d 675.

Here, of course, the transportation is not for hire but for sale, some for consumption and some for resale. What is more, in *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137, 149–150, the Court clearly recognized that the term "service" is not confined to sales but extends to the "movement of gas in interstate commerce" and that one who engages in *either* the sale or the transportation of gas is performing a service within the meaning of both §§ 7 (e) and 7 (b). It could not be more clear that United here abandoned a "service," the taking of Johnson Bayou Field gas and its transportation in interstate commerce. The statutory necessity of prior Commission approval, with its underlying findings, cannot be escaped.

Even so, United argues that the Act gives the Commission no authority over the purchase of natural gas, and that the Commission therefore exceeded its jurisdiction in ordering United to continue purchasing gas from Continental in amounts specified in an expired contract and at prices set unilaterally by Continental. It is true that the Act does not in so many words grant the same express authority over purchases to the Commission that it does over sales. Neither is there a blanket exemption of Commission jurisdiction over the purchase of gas, and there is express authority over transportation as well as sale. Under § 16, the Commission has the power "to perform any and all acts, and to . . . issue . . . such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this Act." 52 Stat. 830, 15 U. S. C. § 717o. Where it is necessary to regulate the purchase of gas in some respects to carry out its expressly granted authority over transportation and sale, the Commission must have the power to do so. In the case before us, there has been a § 7 (b) abandonment of facilities or services without Commission consent. It is therefore quite proper for the

Commission to order the facilities reactivated and the abandoned service restored, even though the resumption by United of the transportation of gas from the Johnson Bayou Field will entail the purchase of gas from Continental at the legally established price. Undoubtedly, the continued purchase of gas has been ordered but only as an incident to regulating transportation or sale. This is no more than the Act authorizes and no more than United undertook to do when it sought and received certification for the service it sought to perform.[5]

After United had begun to purchase gas from the Johnson Bayou Field in 1953 and to transport it to markets in the State of Texas, United sought a certificate of public convenience and necessity authorizing the construction and use of the facilities it had built and the continued transportation of the Johnson Bayou gas. United then asserted that the public convenience and necessity required the issuance of such a certificate.[6] Both the construction and operation of the facilities and the *transportation* of gas by means thereof were found by the Commission to be required by the public convenience and necessity. United was found "able and willing . . . to perform the *service* . . ." for which it had volunteered.[7] A certificate was accordingly issued and formally accepted by United. United now wishes to abandon the express service it agreed to perform—the continued transportation of Johnson Bayou gas—with-

[5] What we have said, of course, does not imply that the Commission has the power to compel initial purchases of gas. We reach only the question of the Commission's power under § 7 (b) to order reactivation of abandoned facilities and service.

[6] United's application for the certificate, docketed September 20, 1954, appears in FTC Docket No. G–2818, United Gas Pipe Line Company.

[7] The Commission's complete order appears in Docket G–2818, *supra*, note 6; an abbreviated version appears in 14 F. P. C. 582. (Emphasis added.)

out a § 7 (b) finding by the Commission "that the present or future public convenience or necessity permit such abandonment." This is precisely what the Act forbids.

United claims that it does not need the Johnson Bayou gas to serve its customers and that the forced purchase of gas at prices set by Continental and approved by the Commission without regard for the prices at which United under contract or competition is bound to sell the gas deprives it of property without due process of law. In our view, these claims are premature. We do not hold that it would be inappropriate for the Commission to permit abandonment in this case if it is asked to do so and the necessary findings are made. We hold only that United has abandoned facilities and service without the consent of the Commission and that it must reactivate those facilities and restore the service until and unless the statutory consent is obtained. If United now resorts to the Commission, it will have every opportunity to present its economic and constitutional grounds for abandonment.

For the reasons herein stated, the judgment of the Court of Appeals is affirmed.

It is so ordered.